

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24

PONCE DE LEON INN d/b/a
HOLIDAY INN TROPICAL CASINO PONCE

Employer¹

and

FEDERACION DE TRABAJADORES
DE EMPRESA PRIVADA

Petitioner

Case 24-RC-8486

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Based on the entire record in this proceeding² and on applicable Board law principles, I have found the petitioned-for bargaining unit of employees as set forth in the petition to be appropriate for the purposes of collective bargaining.³

¹The Employer's name has been amended and appears as stated at the hearing.

²The Employer filed a brief which was duly considered.

³Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- b. The Employer, a Delaware corporation authorized to conduct business in Puerto Rico, is engaged in the operation of a hotel and casino at Ponce, Puerto Rico. During the past twelve-months, a representative period, it purchased and received goods and materials valued in excess of \$50,000 from points and places located outside of the Commonwealth of Puerto Rico. During the same period of time, the Employer derived gross revenues in excess of \$500,000 from sales and performance of its services.
- c. The parties stipulated, and I find, that the Employer, Ponce De Leon Inn d/b/a Holiday Inn Tropical Casino Ponce, is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- d. Federación de Trabajadores de la Empresa Privada, hereinafter the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.
- e. A question affecting commerce exists concerning the representation of certain employees of the Employer, within the meaning of Section 9(b) and Section 2(6) and (7) of the Act.

I. The Petitioned Bargaining Unit

The Petitioner seeks to represent those employees working for the Employer in following bargaining unit:

Included: All housekeeping employees, front desk employees, maintenance employees (including janitors, pool cleaners and gardeners), and food & beverage employees (including cooks, dishwashers, cashiers, hosts, waiters, bartenders, bus persons and concierge) employed by the Employer at its facility located in Ponce, Puerto Rico.

Excluded: All other employees, temporary employees, subcontracted employees, casino personnel, office clerical employees, guards, professional employees and supervisors as defined in the Act.

The Employer contends that the requested unit is inappropriate as it should include the casino employees, which were expressly excluded by the Petitioner from its proposed bargaining unit.

II. Facts

The Employer operates a hotel providing lodging services and a casino at its facilities in Ponce, Puerto Rico. There is a workforce of 203 individuals, including rank and file employees, managers and supervisors. The Vice-president and Director of Operations, Miguel Vega, is the top ranked official to whom Hotel Manager Luis Colón and Casino Director Ibrahim Arce report directly.

All positions included in the petitioned-for unit fall within the control of the hotel manager, Luis Colón, who is directly responsible for managing several hotel departments, including the food & beverage department, the service department and the maintenance department. The managerial and supervisory personnel assigned to these departments have the authority to discipline and responsibly direct the work of those employees who work within the petitioned-for bargaining unit.

The casino managerial and supervisory personnel who report to the casino director are the casino manager, the casino senior supervisor, the casino controller, the slot machine supervisor, the pantry supervisor, the cage manager, the senior cage supervisor and the cage supervisor. The decision to discipline casino employees falls exclusively on this group of casino managers and supervisors and they are solely responsible for supervising and responsibly directing all casino employees in the performance of their duties and responsibilities. For instance, only the casino director, managers and supervisors are exclusively responsible for directing the work of the casino employees. This exclusivity is further revealed by the fact that whenever a supervisor or manager from a hotel department, other than the casino, thinks a casino employee merits discipline, he/she must submit a report to the casino management and supervisory personnel and they are the ones who have the final say on the issue and on whether a disciplinary action is warranted or not.

The casino is a 24-hours-a-day, 7-days-a-week operation. The only other hotel departments and/or employees with a similar work schedule are the maintenance department and, within the service department, the room attendants.

There are about 40 casino employees; these work as housepersons, waiters and waitresses, croupiers and cage cashiers. All of them, with the exception of the housepersons, waiters and waitresses, must have a license issued by the gaming division of the state agency known as the Tourism Company of Puerto Rico in order to be allowed to work in the casino. No other hotel employees must comply with a similar requirement.

The record contains additional factual elements indicating that the casino department operates as a distinct, separate and cohesive unit of employees with respect to the work performed by their department, which is distinctive from the work performed by the positions included in the petitioned-for unit. Thus, the duties and responsibilities of casino employees are not interchangeable, nor do these overlap, with the duties and responsibilities of other hotel employees occupying positions within the petitioned-for unit. The gambling aspect of the work is unique. Thus, croupiers must have knowledge in several or various games such as blackjack, roulette and baccarat and they must be able to execute or carryout these games according to the procedures of the Tourism Company of Puerto Rico's Gaming Division. Croupiers must also have approved courses regarding these games from accredited institutions.

Even though it is a relatively small hotel, there is no overlapping of duties or interchange between employees in the petitioned-for unit and the casino employees. As an example, whenever a waiter, waitress or houseperson assigned to work in the casino is absent in a given day, the Employer will look for another waiter, waitress or houseperson from the casino department to cover that shift. Waiters, waitresses and housepersons who fall under the petitioned-for unit are not considered to cover work shifts in the casino. Likewise, casino employees are not used to cover work shifts in other departments. Therefore, there is no interchange between the different hotel departments included in the petition-for unit and the casino employees. The only way for an employee from another hotel department to work in the casino is for he/she to be formally transferred to an available vacancy at the casino. When this happens, the employee has to undergo a 90 day trial period to see if he/she complies with the new duties and responsibilities adequately. If not, the employee is removed from the casino and is sent back to his or her former position, if it still exists.

The record nevertheless shows also that the casino employees share several terms and conditions of employment with the other hotel employees included in the unit described in the petition. In this respect, all hotel and casino employees fall under the same Human Resources Department, the recruitment and selection process is the same for all employees, the job application forms are the same for all employees, all employees work hourly and they all fall within the same payroll, the time-keeping system for worked hours is known as Kronos and it is used with all employees. Employee hourly wage scales are similar throughout the hotel, starting within wage ranges between \$5.15 to around \$6.00 per hour, with the exception of waiters and waitresses who are paid \$3.70 per hour.⁴ Overtime work for all employees is paid one-and-a-half times the regular hourly rate. All employees are subject to drug testing. All of them wear similar name tags and identification cards, and they are all required to wear uniforms, although these are different depending on their job classification. All employees are subject to the provisions of the same Employee Manual, they share the same cafeteria and parking lot. Employees from all departments participate in the same extracurricular activities organized by the Human Resources Department (i.e. Christmas, Mother's Day and Father's Day activities) and they are all considered for the Employee of the Month award, although the decision as to who gets the award falls on the manager or supervisor of each department.

⁴The record is silent about whether waiters and waitresses work under a tip salary credit system.

III. Legal Analysis

In order to make unit determinations in the hotel industry, the Board applies, on a case-by-case basis, the same traditional community of interest criteria and elements that are analyzed in other industries. *Westin Hotel*, 277 NLRB 1506 (1986). The criteria to be analyzed includes distinctions in the skills and functions of particular employee groupings, their separate supervision, the employer's organizational structure, differences in wages and hours, as well as integration of operations, employee transfer, interchange and contact. *Omni International Hotel*, 283 NLRB 475 (1987); *Atlanta Hilton & Towers*, 273 NLRB 87 (1984).

However, the Act does not require that a petitioned unit be "the most appropriate", even when a different unit from the one requested might be more appropriate. *Hotel Services Group, Inc.*, 328 NLRB 116 (1999); *Omni-Dunfey Hotels, Inc.*, 283 NLRB 475 (1987). Rather, the Board's procedure for determining an appropriate unit under Section 9(b) of the Act is to examine whether the petitioned-for unit is appropriate and if appropriate, the inquiry ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposed by the parties. *Overnite Transportation Co.*, 331 NLRB 662 (2000).

In determining whether the employees possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. *Ore-Ida Foods* 313 NLRB 1016 (1994).

I have analyzed the appropriateness of the petitioned-for unit under the above-mentioned legal principles.

The petitioned-for unit of employees has a solid community of interests and the evidence shows that they are a readily identifiable group within the hotel's organizational structure. I particularly note that the petitioned-for unit of employees are supervised directly by their departmental supervisors and do not share direct common supervision with the casino employees. Likewise, there is no interchange between employees in the petitioned-for unit and the casino employees. These employees are hired under the same hiring procedures, they have similar hourly wages, they use the same time-keeping system and their overtime work is paid one-and-a-half times their regular wage rate. They eat at the same cafeteria and they use the same parking lot. They are all subject to the same Employee Manual, as well as the procedure for drug-testing. They are required to wear uniforms that identify them with their respective working areas, they participate in the same hotel sponsored activities and all their day-to-day personnel matters are handled by the same Human Resources Department. Based on the above, I find that the petitioned-for unit is an appropriate unit for collective bargaining.

The Employer contends that a bargaining unit that excludes the casino employees is not appropriate because in a previous representation petition handled by the Region regarding this same Employer, Case 24-RC-8344, but filed by a different union (United Steel Workers of America), there was a Stipulated Election Agreement that provided for an election in a hotel-wide unit. The Employer claims that the prior stipulation for an election in a hotel-wide unit is binding upon the Petitioner in this matter. The Employer did not cite a case in support of its contention and I find it to be without merit as the fact that there was a prior stipulation for the

larger unit is not dispositive of the issue nor does it preclude a finding that a unit excluding the casino employees is also appropriate.

Although to some extent the casino employees share interests, as well as some terms and conditions of employment with the petitioned-for unit employees, nevertheless the casino employees work as a distinct, separate and cohesive unit of employees with respect to the work performed within this department. As discussed above, they do not share direct supervision with the petitioned-for unit employees. There is no overlapping of duties or interchange between the casino employees and the petitioned-for unit employees. Based on the record, I find that the casino employees may be excluded from the petitioned-for unit without affecting the appropriateness of the petitioned-for unit. As I pointed out earlier, the Act only requires that a petitioned-for unit be appropriate, and not the most appropriate unit. *Hotel Services Group, Inc.*, supra; *Omni-Dunfey Hotels, Inc.*, supra.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All housekeeping employees, front desk employees, maintenance employees (including janitors, pool cleaners and gardeners), and food & beverage employees (including cooks, dishwashers, cashiers, hosts, waiters, bartenders, bus persons and concierge) employed by the Employer at its facility located in Ponce, Puerto Rico, but excluding all other employees, temporary employees, subcontracted employees, casino personnel, office clerical employees, guards, professional employees and supervisors as defined in the Act.

There are approximately 62 employees in the bargaining unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. These eligible employees shall vote whether or not they desire to be represented for collective bargaining purposes by Federación de Trabajadores de Empresa Privada.

LIST OF VOTERS

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, two (2) copies of an election eligibility list containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional office, La Torre de Plaza, Suite 1002, 525 F.D. Roosevelt Avenue, San Juan, Puerto Rico 00918-1002, on or before October 13, 2005. No extension of time to file this list shall be granted except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by October 20, 2005.

Dated at San Juan, Puerto Rico this 6th day of October, 2005.



/s/

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